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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73- 338

John C. Carr, Petitioner

v.

Hosea Vann, Thomas County
Commissioner, et al

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Edgar A. Neely, Jr.
618 Fulton Federal Building
Atlanta, Georgia 30303

Counsel for Petitioner

August 27, 1973

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No.

John C. Carr, Petitioner

v.

Hosea Vann, Thomas County Commissioner, et al

The petitioner, John C. Carr respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in respect of this matter on May 31, 1973.

OPINION BELOW

The petitioner seeks by his Writ to have the judgment below reviewed. The judgment was entered without opinion in action no. 73-1368 and is recorded at 477 F. 2d 594 (5th Cir. 1973). The judgment below is attached as Appendix A to this Petition and the judgment of the trial court appears as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered per curiam on May 31, 1973 with Petition for Rehearing having been denied on June 21, 1973. This Petition was filed within ninety days of the entry of judgment.

QUESTION PRESENTED

Does 42 U.S.C. 1983 afford one whose **property rights** have been **unconstitutionally infringed** by local officials acting under color of law a cause of action for damages which cause of action may be heard by a Federal District Court pursuant to 28 U.S.C. 1343?

STATUTORY PROVISIONS INVOLVED

The statutory provisions relevant to the decision of this case are 42 U.S.C. 1983 and 28 U.S.C. 1343(3) which appear as Appendix C attached hereto.

STATEMENT OF FACTS

This lawsuit was commenced in the District Court of the United States for the Middle District of Georgia, Thomasville Division, by the filing of the Complaint by the plaintiff seeking damages and injunctive relief. The defendants named were the members of the Thomas County Board of Commissioners, the County governing body, and Thomas County, a public corporation and political subdivision of the State of Georgia.

At the present stage of the proceedings, the plaintiff's request for injunctive relief is moot and the defendant, Thomas County, has been dismissed pursuant to Court Order and is no longer involved in the proceedings.

The plaintiff alleged that the defendants acting under color of law were in the process of paving a previously dirt

road which ran through his property. The plaintiff further alleged that the paving process was being accomplished in such a grossly, willfully and wantonly negligent manner as to cause severe and permanent damage to the beauty and value of the plaintiff's property and that as a consequence he was deprived of his Constitutional rights within the meanings of 42 U.S.C. 1983.

In his Complaint, as amended, the plaintiff submitted that the Federal District Court had jurisdiction to determine the dispute under 28 U.S.C. 1343(3) as a result of the plaintiff's contention that the willful and wanton acts of the defendants in the construction of the road constituted a deprivation of his civil rights within the meaning of 42 U.S.C. 1983. The plaintiff further submitted that the District Court had jurisdiction in that the acts of the defendants amounted to an unconstitutional deprivation of property without compensation under the 5th and 14th Amendments to the United States Constitution.

Subsequent to answering, the defendants filed a Motion for Summary Judgment which raised several issues including the proposition that 42 U.S.C. 1983 does not afford one a cause of action for the deprivation of property or property rights. This issue and the others raised by the defendants were discussed with the Court during hearings on two separate occasions.

Subsequent to these hearings, the trial judge entered an order, attached hereto as Appendix B, which treated the Defendant's Motion for Summary Judgment as a Motion to Dismiss and which dismissed the plaintiff's Complaint on jurisdictional grounds. The sole basis for the trial judge's ruling was that 42 U.S.C. 1983 does not afford a cause of action in the Federal Court for deprivation of property rights.

The petitioner then appealed the dismissal of his Complaint to the Fifth Circuit. A number of issues were briefed for that Court, specifically all of the issues raised by the defendant's motion for summary judgment. Although

the trial Court's ruling was based on only one of the issues raised, the other issues were briefed on the theory, submitted by the appellees, that the Court of Appeals might determine that although the order of the Trial Court was void insofar as the grounds set out in support of it were concerned, it might be affirmed on other grounds. Nonetheless, the Fifth Circuit affirmed the judgment on May 31, 1973 per curiam, setting out no basis for its affirmance. The petitioner is forced to assume that the affirmance was based on the same reasoning as set out in the Order of the Trial Court in that the Court of Appeals provided no alternate basis for its judgment.

JURISDICTION OF TRIAL COURT

As set out by the Petitioner in the Statement of Facts, he alleged that the District Court had jurisdiction to determine this matter under 28 U.S.C. 1343(3) in that the petitioner alleged in his Complaint that the defendants acting under color of law had deprived him of his constitutional rights within the meaning of 42 U.S.C. 1983. Alternately, the petitioner alleged that the defendants, in taking his property for public use without compensation, had denied him his rights under the 5th and 14th Amendments to the United States Constitution.

REASONS FOR GRANTING THE WRIT

Does 42 U.S.C. 1983 afford one whose property rights have been unconstitutionally infringed by local officials acting under color of law a cause of action for damages which cause of action may be heard by a federal district court pursuant to 28 U.S.C. 1343?

The Trial Court dismissed the plaintiff's Complaint on jurisdictional grounds on the theory that 42 U.S.C. 1983 did not authorize redress for the unconstitutional deprivation of a property right. Although the issues potentially involved in this case were briefed for the Court of Appeals when that order was appealed, the Court of Appeals affirmed the lower Court per curiam, setting out

no basis in support of the affirmance. The petitioner must then assume that the Court of Appeals affirmed the Trial Court on the basis of the reasoning set out in the order affirmed. In affirming the dismissal of the plaintiff's Complaint, the Court of Appeals is in direct conflict with the decision of this Court in **Lynch v. Household Finance Corporation** 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972). In **Lynch** the Court had this to say about the impact of 42 U.S.C. 1983:

> "The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized . . . . Congress recognized these rights in 1871 when it enacted the predecessors of § § 1983 and 1343 (3). We do no more than reaffirm the judgment of Congress today." 405 U.S. at 552.

The result of the Court of Appeals action in this case is that it has decided a Federal question in a way in conflict with an applicable decision of this Court. The petitioner submits that this is a case falling within the purview of the guidelines set out by Rule 19 of the rules of this Court concerning the issuing of Writs of Certiorari.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in regard to this matter.

Respectfully submitted,

/s/ Edgar A. Neely, Jr.
EDGAR A. NEELY, Jr.

I hereby certify that on this 27th day of August, 1973, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Mr. Elliott P. McCollum, Jr. and Mr. Charles F. Johnson, counsel for the respondents. I further certify that all parties required to be served have been served.

/s/ Edgar A. Neely, Jr.
EDGAR A. NEELY, Jr.
Counsel for Petitioner

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1368
Summary Calendar*

JOHN C. CARR,
Plaintiff-Appellant,

versus

HOSEA VANN, Etc., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(May 31, 1973)

Before GEWIN, COLEMAN and MORGAN,
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F. 2d 409, Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F. 2d 966.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

JOHN C. CARR,	:	
Plaintiff	:	
v.	:	**CIVIL ACTION**
	:	
HOSEA VANN, THOMAS COUNTY COMMISSIONER, et al.,	:	**FILE NO. 994**
Defendants	:	

MEMORANDUM OPINION AND ORDER

In this action the Plaintiff seeks to recover monetary damages sustained by him as the result of alleged negligent construction of a roadway through his property by the Defendants. Recognizing that there is no diversity of citizenship, the plaintiff asserts jurisdiction under 42 U.S.C. §1983, a civil rights statute. The Defendants contend, among other things, that this Court lacks jurisdiction and have filed a motion for summary judgment.

The Defendants in this case are Thomas County, Georgia and the County Commissioners in their official capacities. Section 1983 of Title 42 of the United States Code does not confer jurisdiction of suits filed against a state or its political subdivisions. **Monroe, et al. v. Pape, et al., 365 U.S. 167 (1961).**

Furthermore, in this case the Plaintiff seeks to recover for property damages only. There is no allegation of any injury or damage of a personal nature. It has been frequently held that the civil rights statute relied upon by Plaintiff was not designed to support a cause of action the gist of which is damage or injury to property. **Hague v. CIO, 307 U.S. 496 (1939); Eisen v. Eastman, 421 F. 2d 560 (2 Cir. 1969); Collins v. State of Florida, et al., 432 F.2d 60 (5 Cir. 1970); Brown v. Wainwright, 419 F.2d 1308 (5 Cir. 1969).**

The plaintiff could have asserted his cause of action in the state courts. The civil rights statute, despite its broad language, was not intended to simply provide a second forum in which a claim for property damage might be litigated. **Bradford Audio Corporation v. Pious, 392 F. 2d 67 (2 Cir. 1968).**

Regarding the Defendant's motion for summary judgment as a motion to dismiss, the Court sustains the motion and directs that the complaint be dismissed on jurisdictional grounds.[1]

IT IS SO ORDERED this 26th day of January, 1973.

/s/ J. Robert Elliott

UNITED STATES DISTRICT JUDGE

[1] In support of the motion for summary judgment the Defendants contend that the record already developed in this case shows that the Plaintiff has by deed waived any claim against the Defendants for damages consequent upon the construction of the road. The disposition here made of this matter makes it unnecessary for the Court to rule on this contention.

42 U.S.C. 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the privation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. 1343(3): The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

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IN THE

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OCTOBER TERM, 1973

No. 73-338

JOHN C. CARR,

Petitioner,

versus

HOSEA VANN, THOMAS COUNTY COMMISSIONER, et al.,

Respondents.

BRIEF OF RESPONDENTS HOSEA VANN, THOMAS COUNTY COMMISSIONER, ET AL. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Elliott P. McCollum, Jr.
McCOLLUM & McCOLLUM
P. O. Box 5
Thomasville, Georgia

Charles F. Johnson
P. O. Box 127
Thomasville, Georgia

Attorneys for Respondents
Hosea Vann, Thomas County
Commissioner, et al.

TABLE OF CONTENTS

Page

JURISDICTION 1

THE QUESTION PRESENTED 1

STATEMENT OF FACTS 2

REASONS FOR DENYING THE WRIT 4

CONCLUSION 8

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

Cases:

Fourth National Bank of Macon, Georgia v. Willingham, 213 Fed. 219 (5 C.C.A. 1914) 5

Lynch v. Household Finance Corporation, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972) 6

Merritt v. Dixon, 222 Ga. 432; 150 S.E.2d 831 (1966) 7

Monroe, et al. v. Pape, et al., 365 U.S. 167 (1961) 6, 7

Other Authorities:

42 U.S.C. §1983 ..... 2, 4, 5, 7

Georgia Code Ann. §95-801 7

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-338

. JOHN C. CARR,

Petitioner,

versus

HOSEA VANN, THOMAS COUNTY COMMISSIONER, et al.,

Respondents.

BRIEF OF RESPONDENTS HOSEA VANN, THOMAS COUNTY COMMISSIONER, ET AL. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

JURISDICTION

The jurisdiction of this Court to hear and decide the petition for writ of certiorari is not in question.

THE QUESTION PRESENTED

1. Where four questions are raised in the District Court, and the same four questions are raised by the appellant in his appeal to the Fifth Circuit Court, can the petitioner for a writ of certiorari assume that the per curiam decision of the Fifth Circuit was based upon

only one of the grounds which he complains of in his petition for writ of certiorari?

2. Does 42 U. S. C. 1983 confer jurisdiction of suits filed against a political subdivision and its officers who are sued in their official capacity?

STATEMENT OF FACTS

We controvert certain statements contained in petitioner's statement of facts and believe that certain pertinent facts should be added thereto.

We disagree that the law suit filed by the petitioner has been dismissed as to the defendant Thomas County or the Commissioners of Thomas County who were sued as joint defendants in their official capacity as County Commissioners. In the second paragraph of petitioner's statement of facts, he indicates that Thomas County is no longer involved in these proceedings. It is true that Judge Elliott, District Court Judge, dismissed the complaint but it was from this dismissal that the petitioner appealed to the Fifth Circuit Court and from that court's affirmance of the lower court's decision, petitioner now seeks a writ of certiorari from this court. There has been no dismissal of any defendant or a change of the status of any of the defendants in this case; and by reason of the appeal from the lower court's dismissal, including the issue involving the suit against a political subdivision, this is still a case against Thomas County, Georgia, and its commissioners in their official capacities.

We also disagree with the statement contained in the last sentence of the third full paragraph on page 3 of the application, to-wit: "The sole basis of the trial judge's ruling was that 42 U.S.C. 1983 does not afford a cause of action in the Federal Court for deprivation of property rights."

We further disagree with the last paragraph beginning on page three wherein applicant admits filing the appeal to the Fifth Circuit Court and briefing all the issues raised in the trial court but stating that the trial court's decision was based on only one of the issues raised. The decision of the District Court contradicts such a statement and shows three reasons for entering the order dismissing the complaint, at least two of the grounds being jurisdictional.

This case was originally filed in the Superior Court of Thomas County, Georgia, seeking injunctive relief only. The parties were the same and the allegations were substantially identical with those set forth in the instant suit except that in the instant case property damages were also demanded. The case was adjudicated in the state court and a decision was entered in favor of the defendants with no appeal being taken therefrom. Thereafter the instant suit was filed and took the course as outlined in the applicant's statement of facts, except as controverted and corrected in this statement of facts.

REASONS FOR DENYING THE WRIT

WHERE FOUR QUESTIONS ARE RAISED IN THE DISTRICT COURT, AND THE SAME FOUR QUESTIONS ARE RAISED BY THE APPELLANT IN HIS APPEAL TO THE FIFTH CIRCUIT COURT, CAN THE PETITIONER FOR A WRIT OF CERTIORARI ASSUME THAT THE PER CURIAM DECISION OF THE FIFTH CIRCUIT WAS BASED UPON ONLY ONE OF THE GROUNDS WHICH HE COMPLAINS OF IN HIS PETITION FOR WRIT OF CERTIORARI?

The petitioner admits in his petition for a writ of certiorari that other issues were raised and briefed in the Court of Appeals, but says he is forced to assume that the Circuit Court's opinion was based on the same reasoning as set out in the Order of the Trial Court. We would like to direct this court's attention to the fact that when the petitioner filed his appeal to the Circuit Court that he first briefed all the issues that were raised in the District Court.

The decision in the Court of Appeals affirming the District Court could be based on any one of the four issues that were presented to that court, all of which were at least mentioned in the District Court's decision. Assuming, arguendo, that the District Court was wrong in its ruling that Title 42 §1983 does not protect property rights, the Circuit Court still could have affirmed the District Court's decision on three other grounds which were presented to that court on the theory that an order correct in itself will not be disturbed although the reasons for it, or the grounds on

which it is based are incorrect. *Fourth National Bank of Macon, Georgia* v. *Willingham*, 213 Fed. 219 (5 C.C.A. 1914).

The Petition for writ of certiorari states that the case was dismissed against Thomas County and it is no longer involved. The only basis for this statement is the ruling contained in Judge Eiliott's decision. However, Judge Elliott's ruling did not dismiss a defendant or defendants and it was from this dismissal that the petitioners appealed to the Fifth Circuit.

The applicant should not be permitted to raise an issue in the Fifth Circuit and then in his application for writ of certiorari apparently concede that the District Court and the Fifth Circuit Court correctly ruled on some of the issues therein raised but incorrectly ruled on another issue which the applicant assumes is the sole basis of the per curiam affirmance.

DOES 42 U.S.C. §1983 CONFER JURISDICTION OF SUITS FILED AGAINST A POLITICAL SUBDIVISION AND ITS OFFICERS WHO ARE SUED IN THEIR OFFICIAL CAPACITY?

It was argued in the District Court and the Court of Appeals that Title 42 §1983 of the United States Code does not confer jurisdiction in cases filed against a State or its political subdivisions. The respondents in this case are Thomas County, Georgia and the Board of Commissioners in their official capacity.

The leading case which was decided by this Court is *Monroe, et al.* v. *Pape, et al.*, 365 U. S. 167 (1961) and in a lengthy discussion of the issue involved held specifically that the aforementioned Code Section did not apply to municipal corporations. In the *Monroe* case, this Court went extensively into the history of the legislation and the debates in Congress concerning its intent, and in the decision quoted Representative Roland speaking for the House conferees concerning the inclusion of municipalities with the ambit of the Statute where he said, "that that section imposing liability upon towns and counties must go out or we should fail to agree." In conclusion, this Court stated in the *Monroe* case that "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word "person" was used in this particular Act to include them."

The case of *Lynch* v. *Household Finance Corporation*, 405 U. S. 538, 92 S. Ct. 1113, 31 L. Ed. 2d 424 (1972) which the petitioner relies on as his panacea in his Petition for a writ of Certiorari was a suit against sheriffs who levy on bank accounts and against creditors who invoke the garnishment statute prior to a suit being filed. This Court held that the *Lynch* case was "An action taken by private parties who were not proceeding under a Court's supervision and who were using, as agents, state officials who were themselves not acting pursuant to a court order or under a court's authority." 92 S. Ct. 1113, 1123. The Acts of the private parties in the *Lynch* case would not have been acts

rendered in their official capacity; whereas the Act of the Board of Commissioners of Thomas County, Georgia in authorizing the paving of the road which is the subject matter of this law suit would be an act in their official capacity.

The petitioner stated in his complaint that he is suing Thomas County, Georgia and its Commissioners in their official capacity. The deed that the petitioner signed conveying the right-of-way to the road was made to Thomas County, Georgia, but the only way a county can act is through its duly elected and qualified officials. The Board of Commissioners of Thomas County, Georgia authorized the paving of the road and this authority is given to them as is stated in Georgia Code Ann. §95-801. When the Commissioners were sued in their official capacity, it was a suit against Thomas County, Georgia and this Court held in the *Monroe* case that a County is not a person within the meaning of Title 42 §1983.

If the petitioner insists that this case is no longer pending against Thomas County, Georgia as he alleges in the second paragraph of his statement of facts on page two of his brief, then the case of *Merritt* v. *Dixon,* 222 Ga. 432; 150 S.E. 2d 831 (1966) is directly in point. In the *Merritt* case the Supreme Court of Georgia said, "Art. XI, Sec. I, Par. I of the Georgia Constitution (Code Ann. §2-7801) provides in part that 'each county shall be a body corporate with such powers and limitations as may be prescribed by law. All suits by or against a county shall be in the name thereof. . . .' Where a suit is brought against the board

of county commissioners alleging that the building of a certain road has injured the plaintiff, the suit is intended as one against the county, and where the petition does not name as a defendant the county as a corporate body but instead only names the board of commissioners, who are its agents, the petition cannot be amended and must be dismissed."

CONCLUSION

For the foregoing reasons, respondents Hosea Vann, Thomas County Commissioner, et al. respectfully request that the writ be denied.

Respectfully submitted,

ELLIOTT P. McCOLLUM, JR.

CHARLES F. JOHNSON

Attorneys for Respondents
Hosea Vann, Thomas County
Commissioner, et al.

CERTIFICATE OF SERVICE

We hereby certify that on this ____ day of September, 1973, three copies of the Brief in Opposition to Certiorari For Respondents Hosea Vann, Thomas County Commissioner, et al. were mailed, postage prepaid, to Mr. Edgar A. Neely, Jr., 618 Fulton Federal Building, Atlanta, Georgia, 30303.

ELLIOTT P. McCOLLUM, JR.

CHARLES F. JOHNSON

Counsel for Respondents